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KHN TRADING & CONSTRUCTION RESOURCES SDN BHD v. MAJLIS PERBANDARAN AMPANG JAYA & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
AZlAN SULAIMAN J
[ORIGINATING SUMMONS NOS: WA-24C(ARB)-47-07-2024
B & WA-24C(ARB)-51-07-2024]
22 NOVEMBER 2024

Abstract – *An arbitrator is said to have exceeded his jurisdiction, justifying setting aside of the final award, when he decides on a dispute that was not contemplated by or fell outside the scope of the parties' pleaded cases. This includes deciding on a 'new difference', which is a new dispute not within the original submission. While posing questions to both parties on the new difference may not automatically constitute a breach of natural justice, if the new difference forms the core basis of the arbitrator's decision, it demonstrates that the arbitrator has indeed decided on a matter outside their jurisdiction.*

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E ***ARBITRATION:*** *Arbitral award – Enforcement – Application for – Arbitration on construction matters – Termination of construction contract – Whether arbitrator decided on issues which departed from pleaded case – Whether arbitrator acted within jurisdiction – Whether natural justice observed – Whether award ought to be recognised and enforced as judgment or order – Arbitration Act 2005, s. 38*

F ***ARBITRATION:*** *Arbitral award – Setting aside – Application for – Arbitration on construction matters – Termination of construction contract – Whether arbitrator decided on issues which departed from pleaded case – 'New difference' – Whether arbitrator exceeded jurisdiction – Whether there was breach of natural justice – Whether arbitral award in conflict with public policy – Whether ought to be set aside – Arbitration Act 2005, s. 37*

G ***WORDS & PHRASES:*** *'new difference' – Arbitration matters – Arbitrator decided on dispute not contemplated by, or not falling within terms of submission to arbitration – Whether 'new difference' – Whether relevant to claim – Whether ground for setting arbitral award aside – Arbitration Act 2005*

H Majlis Perbandaran Ampang Jaya ('MPAJ') had appointed KHN Trading & Construction Resources Sdn Bhd ('KHN') as a contractor to construct a Medan Selera and attendant facilities ('project). The initial commencement and completion of the works under the project were 1 April 2017 and 27 January 2017, respectively. When KHN fell behind schedule, MPAJ
I issued a notice for KHN to expedite its slow progress of the works, within

14 days ('notice to remedy'). When the said notice to remedy did not have the desired effect, MPAJ then issued a notice of intention to terminate the contract, giving KHN a further 14 days to recommence works and carry them out diligently. On the eve of the expiry of the 14-day period in the notice of intention to terminate, KHN notified MPAJ of its discovery of underground cables belonging to TNB which it alleged would delay its performance of the works. The issue regarding the TNB cable was discussed the following day at a progress meeting, at which KHN's representatives informed MPAJ's representatives that KHN estimated that the works could be completed by 22 November 2018. MPAJ followed up that meeting with another letter, requiring KHN to extend its existing insurance coverage to 22 November 2018. On account of KHN's failure to comply with the notice of intention to terminate, MPAJ terminated the contract and KHN's appointment as contractor for the project. By a notice of arbitration, KHN commenced arbitration proceedings against MPAJ. This resulted in a final award where the arbitrator found in favour of KHN. Hence, the present originating summonses ('OS') where: (i) KHN applied, under s. 38 of the Arbitration Act 2005 ('Act') for the final award to be recognised and enforced as a judgment or order of the High Court ('OS 47'); and (ii) MPAJ applied, under several provisions of s. 37 of the Act to set aside the final award or, alternatively, set aside only certain parts of it ('OS 51').

Held (allowing OS 51; dismissing OS 47):

(1) The scope of an arbitration is demarcated by the parties' pleaded cases. The arbitrator had decided that MPAJ's termination of the contract was invalid and unlawful because MPAJ had not issued the notice of termination forthwith after the expiry of the 14-day period in the notice of intention to terminate. These findings were aligned with and based on KHN's additional submissions, which departed from KHN's pleaded case on termination. KHN's additional submissions on the questions was a significant departure from KHN's pleaded case on termination. KHN's pleaded case was that MPAJ's termination of the contract was premature and thus invalid because MPAJ's letter dated 4 September 2018 had extended the completion date to 22 November 2019. KHN had never pleaded that the termination was invalid because MPAJ had not issued the termination letter forthwith after the expiry of the 14-day period in the notice of intention to terminate. When the arbitrator accepted that additional submission and made it the very essence of his decision that MPAJ's termination of the contract was invalid, it went to the very heart of the termination issue. Therefore, the arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration and he had decided on a 'new difference' which was irrelevant to the claim – the new difference being understood

A as a new dispute not contemplated by or not falling within the terms of the arbitration submission. Doing so was ground for setting the final award aside. (paras 34, 35, 39 & 41-43)

(2) In deciding the termination issue in the way and on the reasons that he did, the arbitrator did not fail to apply the rules of natural justice, for these two reasons: (i) even though he failed to appreciate that KHN's additional submissions on the arbitrator's questions was a 'new difference' and a significant departure from KHN's pleaded case on termination, he had posed the additional questions to both parties. Thus, they were both given equal opportunity to respond, which MPAJ did; and (ii) there was no evidence of MPAJ requesting the opportunity from the arbitrator to respond to KHN's additional submissions, to rebut that departure from KHN's pleaded case on termination. Thus, there was no corresponding failure by the arbitrator to afford the opportunity to MPAJ to comment on or submit on that 'new difference' before making the final award. However, that 'new difference' was decisive and of considerable potential importance to the outcome of the dispute and was certainly neither peripheral nor irrelevant. This was because that new difference was the very basis on which he decided that MPAJ's termination of the contract was invalid and unlawful. That that 'new difference' was decisive and of considerable potential importance to the outcome of the dispute was further obvious from the fact that the arbitrator had actually rejected KHN's pleaded case on termination. (paras 50-54)

(3) Having found that there was no breach of natural justice rendering the final award to be in conflict with the public policy of Malaysia in the determination of the termination issue, the final award was not liable to be set aside on that ground. Thus, on the termination issue, the final award was liable to be set aside only on the ground that the arbitrator exceeded his jurisdiction. (paras 61 & 62)

(4) The arbitrator had effectively re-opened an issue which he had already decided and had brought into the arbitration hearing arena something which was beyond what he actually had to decide. What he had to decide at the hearing was the parties' respective pleaded claims against each other. Costs thrown away was not one of the pleaded disputes between the parties but was an interlocutory matter that had already been decided and disposed of before the arbitral hearing. However, just like the termination issue, for the same two reasons, the arbitrator did not fail to apply the rules of natural justice in deciding the issue of costs. The final award ought to be set aside because the arbitrator had exceeded his jurisdiction in re-deciding it. (paras 71, 73 & 76)

(5) The whole of the final award should be set aside. With the setting aside of the final award, there was no issue of recognising the final award as binding and to be enforced as a judgment or order of the High Court. (paras 85 & 88)

Case(s) referred to:

Ahmani Sdn Bhd v. Petronas Penapisan (Melaka) Sdn Bhd & Other Cases [2015] 9 CLJ 782 HC ***(refd)***

Cantilon Ltd v. Urvasco Ltd [2008] EWHC 282 ***(refd)***

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd [2020] 9 CLJ 213 FC ***(refd)***

Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291 CA ***(refd)***

Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic [2017] 9 CLJ 273 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 8, 33(6)(c), 37, 37(1)(a)(iv), (v), (b)(2), (2)(b)(i), (ii), (3), 38

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Reported by Lina E

JUDGMENT

Azlan Sulaiman J:

Introduction

[1] An arbitration between KHN Trading & Construction Resources Sdn Bhd ("KHN") and Majlis Perbandaran Ampang Jaya ("MPAJ") resulted in a final award dated 31 May 2024 ("final award").

[2] Originating Summons No: WA-24C(ARB)-47-07/2024 ("OS 47") is KHN's application under s. 38 of the Arbitration Act 2005 ("Act") for the final award to be recognised and enforced as a judgment or order of the High Court, whilst Originating Summons No: WA-24C(ARB)-51-07/2024 ("OS 51") is MPAJ's application under several provisions of s. 37 of the Act to, *inter alia*, set the final award aside or alternatively set aside only certain parts of it.

[3] In this judgment, I will consider and decide OS 51 first; if the final award is set aside, that would decide OS 47.

A **OS 51**

[4] For OS 51, MPAJ invokes ss. 37(1)(a)(iv), 37(1)(a)(v), 37(1)(b)(2), 37(2)(b)(i) and 37(2)(b)(ii) of the Act. In a nutshell, MPAJ contends that the final award should be set aside because:

B (i) the learned arbitrator exceeded his jurisdiction; and/or

(ii) there was a breach of justice rendering the final award to be in conflict with public policy.

[5] From MPAJ's affidavits and submissions in support of OS 51, its C grounds for setting aside the final award revolve around the learned arbitrator's findings in regard to two issues, namely:

(i) the issue of the termination of the construction contract between MPAJ and KHN ("termination issue"); and

(ii) the issue of costs thrown away ("costs issue").

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[6] I will deal with each issue in turn and set out the salient facts relevant to each issue as I do so.

Termination Issue

Salient facts

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[7] By a letter of appointment dated 16 March 2017, MPAJ appointed KHN as contractor to construct a Medan Selera and attendant facilities in Pandan Jaya ("project"). The conditions of contract were the PWD. Form 203A conditions of contract ("COC"). The initial commencement and F completion of the works under the project were 1 April 2017 and 27 January 2017 respectively.

[8] When KHN fell behind schedule, MPAJ issued a notice dated 6 May 2018 for KHN to expedite its slow progress of the works, within 14 days ("notice to remedy").

G **[9]** When that notice to remedy did not have the desired effect, MPAJ then issued a notice of intention to terminate the contract dated 16 August 2018 giving KHN a further 14 days to recommence works and carry them out diligently ("notice of intention to terminate").

H **[10]** On the eve of the expiry of that 14-day period in the notice of intention to terminate, by a letter dated 29 August 2018, KHN notified MPAJ of its discovery of underground cables belonging to TNB which it alleged would delay its performance of the works ("TNB cable issue"). This TNB cable issue was discussed the following day at a progress meeting, at which KHN's representatives informed MPAJ's representatives that KHN estimated that I the works could be completed by 22 November 2018. MPAJ followed up

that meeting with a letter dated 4 September 2018 ("MPAJ's 4 September 2018 letter") requiring KHN to extend its existing insurance coverage to 22 November 2018.

[11] Then, by a notis penamatan pengambilan kerja kontraktor dated 19 September 2018 ("termination notice"), on account of KHN's failure to comply with the notice of intention to terminate, MPAJ terminated the contract and KHN's appointment as contractor for the project.

[12] Even though KHN wrote to MPAJ expressing its dissatisfaction with the termination and requested MPAJ to reconsider, MPAJ stood by its decision.

[13] By a notice of arbitration dated 12 December 2018, KHN commenced arbitration proceedings against MPAJ, with the termination issue at the forefront of that action. The learned arbitrator was appointed as a sole arbitrator.

[14] The learned arbitrator found in favour of KHN on the termination issue. In para. 5.1.1 of the final award, the learned arbitrator stated:

> 5.1 Accordingly, I hereby find, determine and declare and award that:
>
> 5.1.1 the respondent's notice of termination dated 19 September 2018 is invalid and/or wrongful and thus the respondent's Termination is unlawful.

[15] MPAJ essentially contends that that finding and determination should be set aside because the grounds underlying it were not KHN's pleaded case but a departure from it. Consequently, the learned arbitrator exceeded his jurisdiction.

Analysis And Decision

[16] Determining this objection requires this court to ascertain what KHN's pleaded case on termination was and whether the learned arbitrator had departed from that pleaded position in finding MPAJ's termination of the contract to be invalid and unlawful.

[17] In his order for Directions No. 1 dated 25 June 2019 ("OFD 1"), the learned arbitrator had directed the parties to file their respective pleadings.

[18] In its amended statement of claim filed pursuant to OFD 1, KHN had indeed included therein its challenge to the validity of MPAJ's termination of the contract. The thrust of that challenge was that MPAJ's 4 September 2018 letter constituted an extension of time of the completion date to 22 November 2018, and therefore MPAJ's termination of the contract on 19 September 2018 was premature and invalid ("KHN's pleaded case on termination").

[19] Thus, on the basis of KHN's pleaded case on termination, in para. 33(a) and (b) of its amended statement of claim, KHN sought:

> (a) A declaration that the "Notis Penamatan Pengambilan Kerja Kontraktor" dated 19.09.2018 is premature.
>
> (b) And/or alternatively, a declaration that the "Notis Penamatan Pengambilan Kerja Kontraktor" dated 19.09.2018 is not valid and not in accordance with the law."

[20] In its amended statement of defence and amended counterclaim, MPAJ denied that MPAJ's 4 September 2018 letter was an extension of time of the completion date to 22 November 2018, and maintained that the termination of the contract was lawful.

[21] I find that the learned arbitrator did indeed decide the termination issue on a different ground than KHN's pleaded case on termination. To me, that is evident from the documents and the final award.

[22] After the arbitral hearing, the learned arbitrator had issued the usual instructions to the parties for submitting their respective written submissions.

[23] After the parties had submitted their written submissions, by Order For Direction No. 20 dated 12 September 2023 ("OFD 20"), the learned Arbitrator had requested the parties to put forth further submissions on the issues he had listed out in OFD 20.

[24] Item 1 on that list in OFD 20 was for further submissions on three specific questions arising from and related to KHN's closing submissions on the termination issue. The three questions (which I will refer to as "Guestion (a)", "Guestion (b)" and "Guestion (c)" respectively, and "learned arbitrator's questions" collectively) were:

> (a) Under Clause 51.1(b) of the conditions of contract, when ought the respondent to have issued a notice of termination following the claimant's continuance of a failure to rectify its default that is stipulated in the respondent's notice of default dated 16 August 2018?
>
> (b) Did the respondent's notice of termination dated 19 September 2018 comply with Clause 51.1(b)?
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> (c) If not so, did the non-compliance render the notice of termination invalid and thus wrongful?

[25] For context, in paras. 99 to 102 of KHN's closing submissions, KHN had submitted as follows:

> 99. After 20 August 2018, the following events took place:
>
> 99.1. On 29 August 2018, the claimant discovered another location in the project with TNB underground cable. This was notified to the respondent on the same day *via* claimant's letter dated 29 August 2018.

99.2. The respondent issued its letter on 29 August 2018 to TNB acknowledging that the claimant's work is disrupted and seeking TNB's assistance to remove their underground cable.

99.3. The respondent acknowledged the claimant's explanation about the TNB underground cable obstruction which disrupted the claimant's completion of works during the work progress meeting on 30 August 2018.

99.4. On 4 September 2018, the respondent issued its EOT letter granting the claimant an extension of time to complete its works until 22 November 2018.

99.3 On 12 September 2018, the claimant notified the respondent about the works affected by the TNB underground cable and informed the respondent that it has yet to receive instructions from the SO pertaining to the underground cables.

100. It is the claimant's Submission that the respondent had waived its right to terminate the Contract when the respondent proceeded to issue its letter dated 4 September 2018 granting the claimant's EOT until 22 November 2018.

100.1 The claimant repeats its submission pertaining to its submission that the letter dated 4 September 2018 is an EOT letter from the respondent.

100.2 It is also our submission that the principle of estoppel applies in the present case to prevent the respondent from taking a different position from its letter dated 4 September 2018 as stated above.

101. On 19 September 2018, the respondent issued its termination letter premised on its notice dated 16 September 2018. The reason for termination is due to the claimant's failure to complete its works 100%.

102. In view of the respondent's EOT letter dated 4 September 2018, it is the claimant submission that the respondent's reliance on the alleged delay in completion is misplaced as the respondent has already extended time for completion to 22 November 2018.

102.1. Despite the respondent's contention that it was not an EOT letter, the claimant submits that the respondent is estopped from taking a different position for the reasons stated above.

102.2. Hence, there is no basis for the respondent's termination which is therefore, unlawful.

102.3. Since the EOT was given until 22 November 2018, the respondent's termination on the basis that the claimant failed to complete its works is also premature.

[26] I find that these submissions are consistent with KHN's pleaded case on termination.

[27] I further find that the departure from KHN's pleaded case on termination occurred when KHN submitted its additional submissions to answer the learned arbitrator's questions ("KHN's additional submissions").

[28] To question (a), KHN submitted:

> Clause 51.1(b) states "if the Contractor fails to remedy the breach within such period, the Government shall have the right to forthwith terminate the Contract by giving a written notice to that effect". The Default Notice was issued by the respondent on 16 August 2018 and therefore, the 14 days notice expired on 30 August 2016. The respondent ought to have issued the notice of termination on 31 August 2018 *ie*, forthwith after the notice period expired. Instead of doing so, the respondent contradicted its position and gave the impression to the claimant that it was waiving the notice of default as per paragraphs 99100 of claimant's Closing Submission. The claimant repeats paragraphs 101-103 of the claimant's Closing submission. We also rely on the recent High Court decision of *Strong Force (M) Sdn Bhd v. Khoo Soon Lee Realty Sdn Bhd* [2023] at para [31(1) of the Judgment, the High Court referred to s. 56(1) of the Contracts Act to state that upon a breach of contract, the LA was voidable at the defendant's option.
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> However, the defendant did not exercise the option to terminate the LA within a reasonable time and instead affirmed the LA by numerous conduct by the defendant. In this regard the claimant repeats its contention that the respondent's conduct which appeared to have waived the notice of default ought to be taken into account as an act of affirmation of the contract and therefore, the respondent should not be allowed to rely on the subsequent termination letter.

[29] To question (b), KHN submitted:

> No, the respondent did not comply with Clause 51.1(b) - we reiterate para (a) above.

[30] To question (c), KHN submitted:

> Yes, non-compliance rendered the notice of termination invalid and/or wrongful. The Federal Court in *Catajaya Sdn Bhd v. Shoppoint Sdn Bd & Ors* [2021] made it clear that termination clauses ought to be construed strictly (see: para 86, claimant's Closing Submission). Any failure to do so, will render the termination unlawful.

[31] The final award is divided into five sections, namely:

Section 1: Introduction

Section 2: Findings

Section 3: Summary

Section 4: Interest and costs

Section 5: Operative Order

[32] In s. 2 of the final award, the learned arbitrator had dealt with the termination issue as the fourth issue. In para. 3.4 of s. 3, the learned arbitrator's summary of that fourth issue is as follows:

> 3.44th Issue-Termination of the Contract
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> 3.4.1 The respondent ought to have issued the notice of termination on 31 August 2018, in accordance with Clause 51.1(b), that is, forthwith after the 14-day notice of default had expired on 30 August 2018.
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> 3.4.2 The respondent has failed to strictly comply with termination procedures under Clause 51.1(b) to forthwith issue a notice of termination after the expiry of the 14-day period stipulated in the notice of default dated 16 August 2018.
>
> 3.4.3 The respondent's non-compliance with the termination procedures under Clause 51.1(b) has rendered its notice of termination dated 19 September 2018 invalid and/or wrongful and thus the respondent's termination is unlawful.
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> 3.4.4 Although I find untenable the claimant's submission that the respondent waived its right to terminate the Contract by reason of the respondent's alleged EOT granting *via* its letter dated 4.92018 (see CMBD 3/pg 560), and I find that the claimant has failed to prove that it proceeded satisfactorily to complete the Works 100% and failed to prove that any act of prevention by the respondent has caused a critical delay to the completion of the Works, I still find the respondent has failed to strictly comply with termination procedures under Clause 51.1 (b) and thus the respondent's notice of termination dated 19 September 2018 is invalid and/or wrongful and thus the respondent's termination is unlawful.

[33] It was consequent to that learned arbitrator's findings on issue 4 that the learned arbitrator stated in para. 5.1.1 of the final award that:

> the respondent's notice of termination dated 19 September 2018 is invalid and/or wrongful and thus the respondent's Termination is unlawful.

[34] It is therefore clear that the learned arbitrator had decided that MPAJ's termination of the contract was invalid and unlawful because MPAJ had not issued the notice of termination forthwith after the expiry of the 14-day period in the notice of intention to terminate.

[35] I find that these learned arbitrator's findings are aligned with and based on KHN's additional submissions, which departed from KHN's pleaded case on termination.

[36] Section 37(1)(a)(iv) of the Act, s. 37(1)(a)(v) of the Act, and s. 37(3) of the Act that MPAJ invokes for alleging that the learned arbitrator exceeded his jurisdiction respectively provide:

> (iv) An award may be set aside by the High Court only if the party making the application provides proof that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

A (v) An award may be set aside by the High Court only if the party making the application provides proof that, subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(3) Where the decision on matters submitted to arbitration can be
B separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[37] The words "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration" and "the award
C contains decisions on matters beyond the scope of the submission to arbitration" in limbs (iv) and (v) of s. 37(1) denote that an applicant must prove that the learned arbitrator had gone beyond the perimeters and scope of the dispute that was actually referred.

[38] In *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ
D 617; [2015] 6 MLJ 126, Mohd Ariff JCA spoke of a "new difference" which may lead to an arbitral award being set aside. He said:

> The learned High Court Judge considered the background facts in some detail. Her Ladyship also evaluated the issues formulated by the Learned Arbitrator, as agreed and modified by both parties. Her Ladyship
> E considered the detailed finding of the Learned Arbitrator, which was quoted in extenso, but concluded that the Learned Arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration. This is an area of arbitration law which allows the court to set aside an award on the ground that an Learned Arbitrator had decided on a 'new difference' which is irrelevant
> F to the claim, the 'new difference' being understood as a new dispute not contemplated by or not falling within the terms of the arbitration submission. The underlying rationale for this rule rests on the consensual nature of arbitration. Parties are not compelled to resort to arbitration contractually, but if they provide for Hand refer their dispute to arbitration, the mandate of the Learned Arbitrator must be limited to the
> G terms defined by the parties for him to exercise his jurisdiction. If the Learned Arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties.
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> This rationale is stated succinctly by the Court of Appeal, Singapore in
> H *PT Prima International Development v. Kempinski Hotel SA & Other Appeals* [2012] SGCA 35:
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> > An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without
> > I the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.

> This case was cited by Her Ladyship, together with several other decisions of the Singapore Courts, such as *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR (R) 597, *CRW Joint Operation v. PT Perusahaan Gas Negara* [2011] 4 SLR 305 and *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1.
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> These persuasive cases, and others, that have been addressed by our courts lay down one basic principle – an Learned Arbitrator must decide the dispute according to the scope of the arbitration and he cannot decide the dispute on issues that have not been raised or addressed by the parties.

[39] In a nutshell, the scope of an arbitration is demarcated by the parties' pleaded cases.

[40] I find that the learned arbitrator's ground for finding that MPAJ's termination of the contract was invalid mirrored or in the very least, was based on what KHN had submitted on the questions in KHN's additional submissions.

[41] I find that KHN's additional submissions on the questions were a significant departure from KHN's pleaded case on termination. KHN's pleaded case was that MPAJ's termination of the contract on 19 September 2018 was premature and thus invalid because MPAJ's letter dated 4 September 2018 had extended the completion date to 22 November 2018. KHN had never pleaded that the termination was invalid because MPAJ had not issued the termination letter forthwith after the expiry of the 14-day period in the notice of intention to terminate.

[42] So, when the learned arbitrator accepted that additional submission and made it the very essence of his decision that MPAJ's termination of the contract was invalid, it went to the very heart of the termination issue.

[43] To borrow/paraphrase the words of Mohd Ariff JCA in *Perwira Bintang Holdings*, *supra*, I consequently find that the earned Arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration, and that he had decided on a 'new difference' which is irrelevant to the claim, the 'new difference' being understood as a new dispute not contemplated by or not falling within the terms of the arbitration submission. Doing so is grounds for setting the final award aside.

[44] I will now decide whether in doing so there was a breach of natural justice rendering the final award to be in conflict with the public policy of Malaysia.

[45] Setting aside an arbitral award on the ground of breach of natural justice rendering the award to be in conflict with the public policy of Malaysia is provided for in ss. 37(1)(b)(ii), 37(2)(b)(i) and 37(2)(b)(ii) of the Act, which MPAJ had also invoked. These sections respectively provide:

A An award may be set aside by the High Court only if the High Court finds that the award is in conflict with the public policy of Malaysia.

Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(b) a breach of the rules of natural justice occurred:

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(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

[46] In *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 8 CLJ 291; [2018] 3 MLJ 608, Mary Lim JCA (as Her Ladyship then was) said of these sections:

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[26] Third, in understanding the intent, ambit and application of s. 37(1)(b)(ii), regard should be had to s. 37(2). A challenge under s. 37(1)(b)(ii) requires the court to find that the award is in conflict with the public policy of Malaysia. Although the phrase 'public policy of

D Malaysia' is not defined in the Act, there is indication in s. 37(2) of what the drafters and thereby Parliament had in mind as to what may amount to a conflict with the public policy of Malaysia. Section 37(2) explains or illustrates that an award is in conflict with the public policy of Malaysia where either: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred

E either: (i) during the arbitral proceedings; or (ii) in connection with the making of the award.

[27] The examples or illustrations in s. 37(2) to explain what circumstances or conditions may be considered as conflicting with the public policy of Malaysia, are by no means exhaustive. This is made plain by its opening

F terms: 'Without limiting the generality of subparagraph (1)(b)(ii)'. Any other circumstance or complaint of the presence of a conflict with public policy however, must fall within the genre set out in s. 37(2)(a) and (2)(b). In other words, the sui generis rule should apply. The court should however, be slow in acceding to any suggestion to expand the recognised and established categories of conflict with public policy.

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[31] Next, having regard to the context of the dispute, that it arises out of commercial and contractual transactions where parties may be said to have received advice including legal advice, the conflict with public policy ground that is envisaged in s. 37(1)(b)(ii) ought to be read narrowly and

H more restrictively. The court's curial intervention should be sparingly used; and this would be in keeping with the terms in s. 8 of Act 646.

[32] This then makes the threshold to be met somewhat high in that by its very nature, 'it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach or conflict with the public

I policy of Malaysia ... The Court must be compelled to agree or that a strong case has been made out that the award conflicts with the public policy of Malaysia. Otherwise, the contractual arrangements of the parties must be maintained'.

> [33] Further, 'it must be understood that the notion or concept of public policy in arbitration is not one grounded in public law, generally understood as the Wednesbury principles. In other words, the award will not be set aside simply because it is irrational or unreasonable or one that is so irrational or unreasonable that no reasonable person could have made such an award. The concept of public policy must be one taken in the 'higher sense, where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the 'integrity of the Court's process and powers will thereby be abused'.

[47] The decision of the Court of Appeal in *Sigur Ros* was affirmed by the Federal Court, reported as *Master Mulia Sdn Bhd v. Sigur Ros Sdn Bhd* [2020] 9 CLJ 213; [2020] 12 MLJ 198. In paras. [53], [54] and [59] of the judgment Vernon Ong FCJ said:

> In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:
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> > First, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;
> >
> > Second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;
> >
> > Third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;
> >
> > Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;
> >
> > Fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
> >
> > Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
> >
> > Seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. [2020] 9 CLJ 213; [2020] 12 MLJ 198 at 233. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and
> >
> > Eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.

A Underlying these guiding principles is the policies and objectives of the New York Convention and the Model Law. As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the
B Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), the courts do not review the merits of the arbitral tribunal's decision.

....

C Although the court's discretion to set aside an award under s. 37(1) isunfettered, it must nevertheless be exercised with regard to the policiesand objectives underpinning the AA 2005. In particular, due cognisancemust be taken of the purposes of encouraging arbitration as a methodof dispute resolution and facilitating the recognition and enforcement ofarbitral awards.

D **[48]** In between the decisions of the Court of Appeal and the Federal Court in *Sigur Ros*, was the Federal Court decision in *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413, involving the same sections. In paras. [55] to [58] of the judgment, Ramly Ali FCJ said:

E Section 37(2)(b)(ii) of the AA 2005 provides that an award made by anarbitral tribunal would be in conflict with the public policy of Malaysia if abreach of the rules of natural justice occurred in connection with themaking of the award. The circumstances stated in s. 37(2) are by nomeans exhaustive. Other appropriate circumstances may also fall
F underthe category of 'public policy' in view of the opening phrase 'withoutlimiting the generality of sub-para. (1)(b)(ii)' as appears in s. 37(2) of the AA 2005. However, it must be appreciated that the concept of publicpolicy generally is itself a broad concept. But in applying the concept forthe purpose of setting aside an award under s. 37 of the AA 2005, theconcept of public policy ought to be read narrowly and more
G restrictively. The court's intervention should be sparingly used. The court must becompelled that a strong case has been made out that the arbitral awardconflicts with the public policy of Malaysia. As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): 'The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where
H enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused'.

Even though the court finds that a breach of the rules of natural justice has been established or that an arbitral award is in conflict with the public policy under s. 37 of the AA 2005, it does not necessarily mean that the
I award must be set aside as a matter of course. The power of the court to set aside an award under s. 37 is discretionary and will not be exercised automatically in every case where the complaints are established

(see: *Kyburn Investments Ltd v. Beca Corporate Holdings Ltd* [2015] 3 NZLR 644; *Sigur Ros Sdn Bhd*). A

The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s. 37. The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The effect of ss. 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice (see: *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v. Bindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v. Impregilo SpA And Others* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined. B C D

The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case *ie*, in instances where it appears a violation of the most basic notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award. Thus, instances such as 'patent injustice', 'manifestly unlawful and unconscionable', substantial injustice', 'serious irregularity' and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s. 37(1)(b)(ii) of the AA 2005 when proven, can be a ground for the court to exercise its discretion to set aside the award (see: Ajwa for Food Industries). Such instances fall within 'the basic and fundamental notions or principles of justice'. The court must adopt the principle as laid down by Howard M Holtzmann and Joseph E Neuhans as found in their commentary in A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary 'that the term 'public policy' which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects'. The terms 'patent injustice' or 'substantial injustice' or 'manifestly unlawful and unconscionable' as often used by the court in setting aside arbitral awards, do not mean injustice which is more than de minimis; what is required is that the injustice had real effect and had prejudiced the basic right of the applicant (see: *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86). E F G H I

[49] The approaches of our courts very much echo what Akenhead J said in para. [57] of the judgment in *Cantilon Ltd v. Urvasco Ltd* [2008] EWHC 282:

> From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:
>
> (a) It must first be established that the Learned Arbitrator failed to apply the rules of natural justice;
>
> (b) Any breach of the rules must be more than peripheral; they must be material breaches;
>
> (c) Breaches of the rules will be material in cases where the Learned Arbitrator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.
>
> (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.
>
> (e) It is only if the Learned Arbitrator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Co Ltd v. The Camden Borough of Lambeth* was concerned comes into play.

[50] In deciding the termination issue in the way and on the reasons that he did, I find that the learned arbitrator did not fail to apply the rules of natural justice. There are two reasons why I say that.

[51] Firstly, even though he had failed to appreciate that KHN's additional submissions on the learned arbitrator's questions was a "new difference" and a significant departure from KHN's pleaded case on termination, he had posed the additional questions to both parties. Thus, they were both given equal opportunity to respond, which MPAJ did.

[52] Secondly, there was no evidence of MPAJ requesting the opportunity from the learned arbitrator to respond to KHN's additional submissions, to rebut that departure from KHN's pleaded case on termination. Thus, there was no corresponding failure by the learned arbitrator to afford the opportunity to MPAJ to comment on or submit on that "new difference" before making the final award.

[53] However, I do find that that "new difference" was decisive and of considerable potential importance to the outcome of the dispute, and was certainly neither peripheral nor irrelevant. This is because that new difference was the very basis on which he decided that MPAJ's termination of the contract was invalid and unlawful.

[54] That that "new difference" was decisive and of considerable potential importance to the outcome of the dispute is further obvious from the fact that the learned arbitrator had actually rejected KHN's pleaded case on termination.

[55] To recap, KHN's pleaded case on termination was that MPAJ's 4 September 2018 Letter constituted an extension of time of the completion date to 22 November 2018 and therefore, the termination of the contract by MPAJ on 19 September 2018 was premature and invalid.

[56] However, as reflected in paras. 2.4.63 to 2.4.69 of the final award (set out below), the learned arbitrator rejected that contention:

> 2.4.63 As explained In paragraph 2.252 above, I find that the respondent's letter dated 4 September 2018 (see CMBD 3/pg 560) to the claimant does not constitute an EOT granted to the claimant until 22 November 2018, and, instead, the letter actually requested the claimant to extend insurance coverage until 22 November 2018. In this respect, I agree with the respondent's Submission in Reply-120122 that the respondent's letter dated 4 September 2018 was not a granting of EOT. Therefore, I find no relevance in the claimant's Closing Submission-para 84-85 that the respondent's termination letter dated 19 September 2018 was at odds with the respondent's letter dated 4 September 2018 which, the claimant alleges, granted an EOT until 22 November 2018. It follows that I dismiss the claimant's reliance on the alleged EOT granted to the claimant until 22 November 2018 by the respondent's letter dated 4 September 2018.
>
> 24.64 I note that the claimant's Closing Submission-para 100 submits that the respondent waived its right to terminate the Contract when the respondent proceeded to issue its letter dated 4 September 2018 granting an EOT until 22 November 2018 and that the respondent was estopped from denying the EOT granted *via* the letter dated 4 September 2018.
>
> 24.65 I also note that the claimant's Closing Submission-para 102 further submits that since EOT was given until 22 November 2018, the respondent's termination letter dated 19 September 2018 (that was premised on the notice of default dated 16 August 2018) was premature.

2.4.66 In the same manner as in paragraph 2.4.63 above, because I dismiss the claimant's reliance on the alleged EOT granted to the claimant until 22 November 2018 by the respondent's letter dated 4 September 2018, I find that the claimant's Closing Submission-para 100 and para 102 is without basis and is untenable. Hence, I dismiss the claimant's submission that the respondent's alleged granting of EOT until 22 November 2018 by the respondent's letter dated 4 September 2018 resulted in the respondent's waiver of its right to terminate the Contract, thereby rendering the respondent's notice of termination dated 19 September 2018 premature.

2.4.67 In this respect, I agree with the respondent's Submission in Reply-para 106-107 that the claimant's reliance on the respondent's letter of 04/09/2018 as an EOT granting to support its contention on the alleged wrongful termination is unfounded and unjustified.

2.4.68 In relation to the above, as explained in paragraph 2.2.17 above, I agree with the respondent's submission that the "discovery of the TNB cables by the claimant during excavation is due to the claimant's own non-compliance with the item F. For this reason, dismiss the claimant's Closing Submission-para 103 that relies on other reasons pertaining to the TNB cable to contend that the respondent's termination was unlawful as follows:

(i) The claimant's reliance on the infrastructure works being uncompleted on 29 August 2018 which the claimant has attributed to the continuing obstruction by the underground TNB cable.

(ii) the claimant's reliance on the SO's delay or failure to give an instruction on the underground TNB cable.

2.4.69 In this respect, I agree with the respondent's Submission in Reply-para 124-125 that RW1's admission that the TNB cable was neither the default of the respondent nor the claimant carries little weight. Hence, I dismiss the RW1's admission.

[57] Those findings then culminated in the learned arbitrator stating as follows in para. 5.1.2 of the final award:

5.1 Accordingly, I hereby find, determine and declare and award that:

5.1.2 the claimant's claim for a further Extension of Time entitlement for delay events in applications for EOT No. 1, EOT No. 2, EOT No. 3 and a delay by TNB underground cable is dismissed.

[58] Thus, what the learned arbitrator actually and effectively did was reject KHN's pleaded case on termination but find MPAJ's termination of the contract nevertheless unlawful and invalid on KHN's additional submissions, which departed from KHN's pleaded case on termination.

[59] I further find that the learned arbitrator's finding on the termination of the contract further to be decisive and of considerable potential importance to the outcome of the dispute because, on that finding, he had awarded KHN the following relief in relation to the termination of the contract which KHN would not have otherwise received if the termination of the contract was found to be valid:

(i) RM89,344, being the refund of liquidated damages, under para. 5.1.7 of the final award;

(ii) RM121,126.34, being the refund of the sums under the performance bond, under para. 5.1.9 of the final award; and

(iii) RM533.811.93, being KHN's costs of the arbitration on a party to party basis, under para. 5.1.13 of the final award.

[60] In addition, under para. 5.1.15 of the final award, the learned Arbitrator had dismissed MPAJ's counter-claim for termination costs of RM1,687,256.10 under MPAJ's certificate of termination costs.

[61] However, at the end of the day, having found that there was no breach of natural justice rendering the final award to be in conflict with the public policy of Malaysia in the determination of the termination issue, the final award is not liable to be set aside on that ground.

[62] Thus, on the termination issue, I find that the final award is liable to be set aside only on the ground that the learned arbitrator exceeded his jurisdiction.

[63] Even though my decision on the termination issue is sufficient to decide OS 51, for completeness, I will, nevertheless, still go on to now consider MPAJ's second ground for setting the final award aside, namely the costs issue.

Costs Issue

Salient Facts

[64] In para. 5.1.16 of the final award, the learned arbitrator had decided:

> The claimant's Solicitors shall release the sum of RM128,000 being reasonable costs thrown away to the respondent's Solicitors who shall provide the appropriate discharge on behalf of the respondent.

[65] The costs issue had actually arisen and been disposed of before the arbitral hearing. Under the learned arbitrator's order for Directions No. 3 dated 19 May 2020 ("OFD 3"), the learned arbitrator had issued directions and deadlines for the bundles of documents (by 3 June 2020) and witness statements (by 8 June 2020). These directions and deadlines were then

revised by the learned arbitrator's order for Directions No. 4 dated 29 June 2020 ("OFD 4"). By OFD 4, the learned Arbitrator also fixed hearing dates of the arbitration on 24 to 28 August 2020 and 14 to 18 September 2020.

[66] However, on 13 August 2020 well after the deadlines in OFD 4, KHN had sought to adduce three further volumes of documents. That resulted in a meeting on 24 August 2020 at which KHN was allowed to adduce those additional three bundles at the inevitable consequence of the hearing dates in August and September 2020 being vacated, and fresh hearing dates being fixed. At that meeting on 24 August 2020, the learned arbitrator further ordered KHN to bear MPAJ's costs thrown away, including MPAJ's legal fees and costs for attending that meeting. That order for KHN to bear MPAJ's costs thrown away was reduced into writing, in the learned Arbitrator's Order For Directions No. 5R dated 24 August 2020 ("OFD 5R").

[67] By a letter dated 11 December 2020, MPAJ then applied for security for that costs, which it calculated as being in the sum of RM238,000. After hearing the parties, the learned arbitrator issued an Order For Interim Measure No. 1 dated 29 January 2021 ("OIM 1") the learned arbitrator found that the sum of RM183,000 was "realistic" as security for MPAJ's costs thrown away, and ordered KHN was ordered to provide a bank guarantee to MPAJ for it. In essence, that was the costs issue.

[68] Despite having already decided on the quantum of costs thrown away, in OFD 20, the learned arbitrator, nevertheless, invited the parties to submit additional submissions on the following question ("costs question"):

> What is the reasonable quantum of 'costs thrown away' as per Order For Interim Measure No. 1 dated 29.1.2021?

[69] MPAJ's response to this costs question was that it should be RM183,000 as already decided, whilst KHN argued that it should not exceed RM48,000.

[70] As stated earlier, in para. 5.1.16 of the final award, the learned arbitrator decided that the amount should be RM128,000.

Analysis And Decision

[71] From these facts, I find that the learned arbitrator had effectively re-opened an issue which he had already decided, and had brought into the arbitration hearing arena something which was beyond what he actually had to decide. What he had to decide at the hearing was the parties' respective pleaded claims against each other. Costs thrown away was not one of the pleaded disputes between the parties, but was an interlocutory matter that had already been decided and disposed of before the arbitral hearing.

[72] Because of that, I find that:

(i) paragraph 5.1.16 of the final award deals with a dispute not contemplated by and not falling within the terms of the submission to arbitration under s. 37(1)(iv) of the Act; and

(ii) paragraph 5.1.16 of the final award is a decision on matter beyond the scope of the submission to arbitration under s. 37(1)(v) of the Act.

[73] However, just like the termination issue, for the same two reasons I find that the learned arbitrator did not fail to apply the rules of natural justice in deciding the costs issue.

[74] Firstly, he had posed the additional questions to both parties.

[75] Secondly, there was no evidence of MPAJ requesting the opportunity from the learned arbitrator to respond to KHN's additional submissions on the costs issue. Thus, there was no corresponding failure to afford the opportunity to MPAJ to comment on or submit on it.

[76] Based on the above, I, therefore, also find in favour of MPAJ on the costs issue, and find that the final award also ought to be set aside because the learned arbitrator had exceeded his jurisdiction in redeciding it.

Relief/Orders On OS 51

[77] In paras. 5.1.1 to 6.1.16 of the final award under the title "operative order", the learned arbitrator had made sixteen findings/determinations / declarations/awards, which I summarise below:

(i) MPAJ's termination of the contract was unlawful;

(ii) KHN's claims for further extension of time (EOT) in relation to EOT No. 1, EOT No. 2, EOT No. 3, and TNB underground cable delays are dismissed;

(iii) KHN's claim for loss and expense under cl. 44 is dismissed;

(iv) MPAJ shall pay KHN a sum of RM442,194.20 being the total value of works completed but unpaid as of the termination date, within 14 days of the final award;

(v) KHN's claim for a variation order amount is dismissed;

(vi) KHN's claim for loss of profits pursuant to the wrongful/unlawful termination is dismissed;

(vii) MPAJ shall pay KHN a sum of RM89,344 being the refund of liquidated damages, within 14 days of the final award;

(viii) KHN's claim for loss of materials pursuant to the wrongful/unlawful termination is dismissed;

(ix) MPAJ shall pay KHN a sum of RM121,126.34 being the refund of sums retained as performance bond, within 14 days of the final award;

(x) KHN's application for a declaration that Interim Certificates No. 9,12 and 13 are incorrect and thus cancelled is dismissed;

(xi) KHN's claim for the cost of financing, on an outstanding sum of RM247,000 due to SME Bank under the deed of assignment dated 4 September 2017 at a rate of 6.6% from the date of final disbursement by SME Bank to a date of full settlement, is dismissed;

(xii) MPAJ shall pay KHN interest at a rate of 5% per annum on the amounts stated in paras. 5.1.4, 5.1.7 and 5.1.9 from the specified start dates until full payment;

(xiii) MPAJ shall pay KHN a sum of RM533,811.93 being the KHN Trading's costs of the arbitration upon a 'party and party' basis, within 14 days of the final award;

(xiv) Pursuant to s. 33(6)(c) of the Act, MPAJ will pay KHN interest at a rate of 5% per annum on KHN's costs of the arbitration, from the date of the final award until full payment;

(xv) MPAJ's counter-claim for termination costs of RM1,687,256 MPAJ's certificate of termination costs is dismissed; and

(xvi) KHN's solicitors shall release the sum of RM128,000, being reasonable costs thrown away, to MPAJ's solicitors who shall provide the appropriate discharge on behalf of KHN.

[78] In OS 51, MPAJ had sought the following relief:

1. That pursuant to Sections 37(I)(a)(iv) and (v) read together with Section 37(1)(b)(ii) and Sections 37(2)(b)(i) and/or (ii) of the Arbitration Act 2005, the final award of the learned Learned Arbitrator Sr John Wong @ Wong Weng Long dated 31.52024 (hereinafter referred to as the "final award") be set aside;

2. Alternatively, pursuant to Section 37(1)(a)(v) read together with Section 37(3) of the Arbitration Act 2005, the final award be set aside in part in relation to the learned Learned Arbitrator's findings at paragraphs 2.14.1 to 2.14.11, paragraph 3.7 and paragraph 5.1.16 of the final award in determining that the amount of the costs thrown away is RM128,000;

3. That the cost of this Originating Summons be borne by the Defendant; and

4. Any other and further relief as this Honourable Court deems fit and proper.

[79] In *Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic* [2017] 9 CLJ 273; [2017] MLJU 1196, Jeffrey Tan FCJ spoke about setting aside those parts of an award containing decisions on matters beyond the scope of the submission to arbitration, under s. 37(1)(a)(v) read together with s. 37(3) of the Act. He said:

> [197] In relation to 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' and 'the award contains decisions on matters beyond the scope of the submission to arbitration', William & Kawharu supra at 17 May 4 thus commented on the first limb of art. 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of s. 37(1)(a)(iv) and (v) of AA 2005):
>
> > This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but has exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution ... The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties have plainly put in issue ... If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration'
>
> [198] Section 37(3) of AA 2005 correspondingly provides 'Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside ... when an issue is clearly put before the tribunal there is no excess of authority if the tribunal applies its own view of the law in respect of that issue ...'

[80] In *Ahmani Sdn Bhd v. Petronas Penapisan (Melaka) Sdn Bhd & Other Cases* [2015] 9 CLJ 782; [2015] 11 MLJ 32, Ahmani was seeking to set aside only certain parts of the award. Mary Lim J (as Her Ladyship then was) spoke of the provisions of s. 37 of the Act that permit setting aside of parts of an award and those that could only result in setting aside the whole. Her Ladyship said:

> I must say that sub-para 37(1)(a)(iv) is not properly invoked in the instant case as Ahmani is seeking to set aside only a part of the award (that which is in respect of the counterclaim); and not the whole award as there is that other part of the award which is in its favour. That being the case, only sub-para 37(1)(a)(v) can be relied on as read together with sub-s (3), it allows for those parts of the award which contain decisions on matters which had not been submitted to arbitration to be set aside.

A I must further say that sub-para 37(1)(b)(ii) cannot be invoked because again, this ground leads to the setting aside of the whole award and not just the part complained of. Ahmani cannot choose or cherry pick. Its challenge must also be seen against those parts which are not challenged or complained of. When that is done, it will be seen that it is only asking for certain parts of the award to be set aside and not the whole award, B which is what sub-para 37(1)(b)(ii) is about.

I am fortified in this regard from a reading of sub-s 37(2). This subprovision indicates that the complaint of conflict of public policy is in relation to the award or that the award contains decisions or decisions on matters which conflict with the public policy of Malaysia; and not just C certain parts of the decision.

In this case, the complaint is that there was a breach of natural justice during the arbitral proceedings or in connection with the making of the award when the arbitral tribunal dealt with the factor of inflation without first inviting the parties to submit or address on the factor. If indeed such an allegation is true, then it would be the whole award which will be D tainted and not just that part identified by the complainant. The provisions of s. 37 do not appear to allow the court to sever as it may in cases of allegations of violations of sub-para 37(1)(a)(iv). Mindful of the limited powers of intervention of the court, a restrictive approach is hereby adopted and applied.

E **[81]** I am also mindful of the fact that, under the appropriate sub-sections, s. 37 allows for setting aside the whole award or part of the award but does not allow the awards to be varied or substituted with other terms. I am in that regard mindful too of s. 8 of the Act which provides:

F Extent of court intervention

No court shall intervene in matters governed by this Act, except as so provided in this Act.

[82] It is clear from the alternative Prayer 2 of OS 51 that, in respect of setting aside parts of the final award under s. 37(1)(a)(v) read together with G s. 37(3) of the Act, MPAJ is confining that to seeking to set aside only those parts relating to the costs issue. The learned arbitrator's findings at paras. 2.14.1 to 2.14.11, para. 3.7 and para. 5.1.16 of the final award that MPAJ singles out to set aside are indeed on the costs issue.

[83] It is therefore also clear that, in respect of the termination issue, H MPAJ is not seeking to set aside only those offending parts in the final award relating to it, but the final award as a whole altogether.

[84] Thus, what MPAJ is seeking is to set aside the final award for both issues and alternatively, set aside parts of the final award only for the costs issue, the latter I presume as a fail-back position if the termination issue is I not decided its way.

[85] However, as I have already found that that the final award should be set aside for both issues on the ground that it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration under limb (iv) of s. 37(1)(a) and contains decisions on matters beyond the scope of the submission to arbitration under limb (v) of s. 37(1)(a), then in my view the whole of the final award should be set aside.

[86] I thereby make the following order as per prayer 1 of OS 51, namely:

> That pursuant to Sections 37(1)(a)(iv) and (v) read together with Section 37(1)(b)(ii) and Sections 37(2)(b)(i) and/or (ii) of the Arbitration Act 2005, the final award of the learned Learned Arbitrator Sr John Wong @ Wong Weng Long dated 31.52024 (hereinafter referred to as the "final award") be set aside.

[87] I further order that KHN do pay to MPAJ costs of RM30,000 subject to an allocatur.

OS 47

[88] Having found in favour of MPAJ on OS 51, then dealing with OS 47 becomes altogether simply and straightforward. With the setting aside of the final award, there is no issue of recognising the final award as binding and to be enforced as a judgment or order of the High Court.

[89] Consequently, I dismiss OS 47 with costs of RM10,000 payable by KHN to MPAJ, subject to an allocatur.